IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1124 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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AJAYKUMAR NATHURAM SHAHU

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1124 of 1993

MR JM PANCHAL for Petitioner No. 1

MR KG SHETH, APP, for Respondent No. 1

CORAM : MR.JUSTICE M.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 20/03/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. This appeal arises out of a judgment and order

rendered by learned Additional Sessions Judge, Court No.11, City Sessions Court, Ahmedabad, in Sessions Case No.40 of 1993 on September 21, 1993, convicting the appellant for offences punishable under Section 302 of Indian Penal Code and Section 135(1) of Bombay Police act. The appellant was sentenced to undergo imprisonment for life and to pay fine of Rs.40,000/- and, in default, to undergo simple imprisonment for a period of two years for the offence punishable under Section 302 of I.P.C. For the offence punishable under Section 135(1) of Bombay Police Act, the appellant was sentenced to undergo simple imprisonment for one month. The Court directed that, if the fine is paid, Rs.25,000/- will be paid to the parents of the deceased.

2. The facts of the case, in a nutshell, can be stated thus:

2.1 One Satishchandra Harivansh Dhobi, while he was proceeding to his school on his bicycle and was passing by D-34 Dispensary situate at Khokhara, at about 7.00 or 7.15 A.M. in the morning of 21st September, 1992, was assaulted upon by Ajay Nathuram Shahu (appellant) and Pradipsinh alias Pappu Hayatsinh Megi. It is the case of the prosecution that, Pradipsinh alias Pappu caught hold of Satishchandra and the appellant inflicted several knife blows on him. Due to the cries raised, police constable Dipuji Kachharaji, Avtarsinh Kansinh, Ansuyaben Bhanushankar and Prakash Harivansh Dhobi rushed to the place. Since Dipuji Kachharaji was in his uniform, on seeing him, the appellant and Pappu tried to run away on the scooter. However, the scooter did not start quickly. They, therefore, abandoned the scooter and ran away. As per the prosecution, deceased-Satischandra told Dipuji Kachharaji that he was assaulted upon by Pappu and the appellant. In the meantime, Prakash Harivansh Dhobi arrived at the spot and he took the victim in an auto-rickshaw to L.G. Hospital. Along with him, Ansuyaben and one young boy also went in the auto-rickshaw to the hospital. On the way to the hospital, Prakash inquired of the victim as to what had happened and he was told by the victim that present appellant and Pappu had caused the injuries. On reaching L.G. Hospital, the victim was initially examined by the doctor and was admitted in the Coma Ward. The Police Constable posted at the hospital informed Amraiwadi Police Station on telephone and, on basis of which, an entry was made in the Register known as Wardhi Book, copy of which is at Ex.24. A complaint was given by Prakash Harivansh Dhobi, brother of the victim and, on basis of that complaint, an offence was registered and the case

was investigated upon. The investigating agency recorded statements of several witnesses and collected other evidence. Having found sufficient evidence against the appellant and Pradipsinh alias Pappu, the police filed charge sheet in the Court of learned Metropolitan Magistrate, Ahmedabad. The learned Metropolitan Magistrate, after following the procedure, committed the case to the City Sessions Court at Ahmedabad. The case was registered as Sessions Case No.40 of 1993.

2.2 Charge against the appellant and Pradip alias Pappu Hayatsinh Megi was framed at Ex.2 for the offence punishable under Section 302 read with Section 114 of Indian Penal Code and Section 135(1) of the Bombay Police Act. Both the accused persons pleaded not guilty to the charge and claimed to be tried.

2.3 Considering the evidence led by the prosecution, the learned Additional City Sessions Judge, while rendering judgment in Sessions Case No.40 of 1993, came to a conclusion that the charges against Pradipsinh alias Pappu Hayatsinh Megi were not established. However, the charges against Ajaykumar Nathuram Shahu (appellant herein) for offence punishable under Section 302 of the I.P.C. and Section 135(1) of the Bombay Police act were held to have been established and, therefore, the impugned judgment and order was passed convicting the appellant and acquitting Pradipsinh alias Pappu.

2.4 Aggrieved by the said judgment and order, present appeal is preferred.

3. Learned advocate, Mr. Panchal, appearing for the appellant submitted that, although, as per the original prosecution case, the incident was witnessed by Avtarsinh Karamsinh (Ex.8), the prosecution could not establish that fact as the said witness did not support the prosecution case. As a result, the prosecution case had to depend on the oral dying declarations claimed to have been made before Ansuyaben Bhanushankar Mehta (Ex.9) and Prakash Harivansh Dhobi (Ex.7). Besides this, the prosecution depended on other circumstances to establish the guilt of the accused. Mr. Panchal submitted that Ansuyaben Mehta has also not supported the prosecution case and she has been declared hostile. The prosecution case, therefore, depends on the dying declarations made before Dipuji Kacharaji and complainant Prakash Harivansh Dhobi. Mr. Panchal submitted that, if the depositions of these witnesses are seen, it is clear that they cannot be relied upon as their version not only does not get support from other cogent material, but suffers from

undependability, if the other contemporaneous material is taken into consideration. Mr. Panchal submitted that the version of the complainant-Prakash about dying declaration having been given by the deceased while he was being taken to the hospital in an auto-rickshaw is not supported by Ansuyaben, who was in the auto-rickshaw. He submitted that the third person who was travelling in the auto-rickshaw - a young boy - has not been offered as a witness at all. So far as the version of Dipuji Kacharaji is concerned, his conduct requires to be noted. Mr. Panchal submitted that Dipuji is a police personnel. Even after having received the dying declaration and having witnessed the miscreants running away, he takes no action. He does not disclose this fact to the Police Inspector-Makwana and, above all, he quietly goes home at 8 o' clock after the incident has occurred. He takes no steps to inform the Investigating Officer about what he had seen or what was told to him till his statement is recorded in the afternoon, after 14.00 hours, when he resumed his duties. Mr. Panchal submitted that Dipuji's version requires to be considered in light of the gravity of injuries sustained by the deceased and the medical evidence in the form of deposition of Dr. Patel, who states that the injured would have become unconscious within seconds/minutes of sustaining the injuries. Mr. Panchal submitted that, apart from this, the admission note at the L.G. Hospital is also noteworthy. The blood pressure was not recorded, the pulse was not palpable, the patient was not responding and was under shock. Mr. Panchal submitted that, all these facts taken collectively, would render deposition of Dipuji and Prakash doubtful regarding oral dying declaration.

3.1 Mr. Panchal submitted that there is third oral dying declaration before Manubhai Chotalal Bhatt, the Head Constable who was on duty at L.G. Hospital, who claims to have been told about the incident and, in turn, gave telephone Wardhi to the Amraiwadi Police Station. The alleged dying declaration before this witness would also be required to be considered in light of the admission note, admission made by Prakash that his brother became unconscious soon after he informed Prakash about the incident, deposition of Dr. Patil and the fact that the entry in question carries overwriting and, admittedly, is completed in two spells. Mr. Panchal has also submitted that, according to Dr. Premal Desai (Ex.28), after the history was recorded, he inquired from the injured and the relatives and the relatives told that "somebody had caused the injury". Mr. Panchal, therefore, submitted that the third dying declaration would also be doubtful.

3.2 Mr. Panchal's submission is that oral dying declaration itself is a weak piece of evidence and when it is shown that the dying declarations suffer from various defects coupled with other circumstances not leading to the guilt of the accused, the conviction could not have been recorded. While drawing attention to these circumstances, Mr. Panchal submitted that, admittedly, as per medical evidence, muddamal knife was not the weapon with which the injuries were caused. Mr. Panchal submitted that the complainant's clothes, though they were blood stained, as stated by him, have neither been seized by the police nor been sent to the F.S.L. for chemical examination. It is also contended that there is no evidence to indicate that, at the time of the incident, the appellant was either the owner or in possession of the scooter in question. No evidence is led in this regard.

3.3 Lastly, it was contended that, as per medical evidence, the injuries found on person of the deceased could not have been caused if he was held by one person and injuries were caused by the other. Therefore, the prosecution case that the deceased was held by Pradip alias Pappu and injuries were caused by the appellant cannot be accepted.

3.4 Mr. Panchal submitted that the cumulative effect of these factors, if considered, would render the prosecution story and evidence doubtful and, therefore, benefit ought to have been given to the appellant, as has been done in case of Pradip alias Pappu. He urged that the appeal may be allowed.

4. Learned Additional Public Prosecutor, Mr. Sheth, has opposed this appeal. According to him, there is no reason to doubt the evidence Dipuji and Manubhai, who are independent police personnel and who have no animosity against the appellant. They have no reason to falsely implicate the appellant. Mr. Sheth submitted that minor discrepancies are bound to creep in. That would only render the deposition and the evidence as natural. He submitted that the incident has occurred between 7.00 and 7.15 A.M., the Wardhi is sent at about 7.20 A.M. the police reaches the hospital and complaint is recorded at 7.30 A.M. and there was no time lag for improving the story and there was no reason for falsely implicating the accused persons. Mr. Sheth submitted that the deposition of Prakash Harivansh establishes motive for the appellant, namely, that the deceased had an affair with the sister of the appellant, which was not approved

by the appellant and that grievance resulted into the present incident. Mr. Sheth, therefore, submitted that the conviction is correctly recorded and the appeal may be dismissed. Mr. Sheth submitted that corroboration is not required if a dying declaration is otherwise found to be reliable.

5. Having regard to the contentions raised before us, in light of the evidence led by the prosecution through which we have gone and have given a close scrutiny, we find that the prosecution case mainly hangs on depositions of Prakash Harivansh (Ex.7), Dipuji Kacharaji (Ex.10) and Manubhai Chhotalal (Ex.23) before whom the oral dying declarations are claimed to have been made.

6. According to Prakash, he reached the spot to find that his brother was bleeding heavily and was lying in an injured condition. It is also clear that when he reached there, Ansuyaben Mehta and Dipuji had also arrived. According to this witness, he immediately took deceased to the hospital in an auto-rickshaw and on the way to hospital, he inquired about the incident and was told by the deceased that he was injured by Ajay Shahu and Pappu. Admittedly, along with Prakash, Ansuyaben and a young boy were in the auto-rickshaw at that point of time. The version of Prakash is not supported by Ansuyaben regarding dying declaration in the auto-rickshaw. The third passenger in the auto-rickshaw has not been examined. His identity is not disclosed nor is his statement recorded. The version of this witness requires to be considered in light of the deposition of Dr. Patil (Ex.21). He deposes in his examination-in-chief that after such injuries, the victim would become unconscious within a few seconds/minutes. It is also required to be noted that, according to Prakash, the victim became unconscious after giving this information. Against this, admission note at the L.G. Hospital (Ex.29) indicates that the patient was conscious but was under shock and was not responding. It is also indicated from the case papers that the pulse were feeble and blood pressure was not recordable. It is, therefore, a question as to whether the deceased was in a position to speak when he was in the auto-rickshaw, as claimed by witness-Prakash; whether he was conscious and, if he was conscious, whether he was in a position to respond to the question put by witness-Prakash as to how the incident had occurred. It requires to be noted that Ansuyaben does not support this version of witness-Prakash. His say about oral dying declaration is thus quite vulnerable and cannot be accepted as a wholly reliable piece of evidence

to connect the appellant with the crime and confirm the conviction on its basis.

7. Another witness is Constable-Dipuji Kacharaji (Ex.10). He claims to have rushed to the place as he was posted at the house of Ansuyaben Mehta for her protection, which is located near the place of incident. According to this witness, a boy came to them and informed that a quarrel had taken place. Ansuyaben was feeding birds at that time. He, therefore, along with Ansuyaben went near D-34 Dispensary. He noticed that the two accused persons sitting in the court were trying to start the scooter by giving kick. The scooter was of blue colour. Dipuji says that he was in uniform and, therefore, on seeing him, both the accused persons ran away abandoning the scooter. They noticed a boy lying in an injured condition and he inquired as to who caused injuries. The boy in a feeble tone informed that Pappu caught hold of him and Ajay Shahu caused the injuries. The witness admits that he did not know the accused persons earlier.

7.1 The version of this witness is tested by cross-examining him. What emerges from his cross-examination is that, after the boy was taken to the hospital, while he was there at the spot, Police Inspector-Makwana came there and he informed Mr. Makwana that a quarrel had taken place. He did not say anything about the dying declaration or having seen the assailants fleeing away to this witness. Even, thereafter, at about 8 o' clock, he went home and resumed his duties at 2.00 P.M. Thereafter, his statement was recorded. He remained at home and did not taken any action either for informing the police that the assailants were seen by him running away or that an oral dying declaration was given by the deceased before him. It is also worthwhile to note that, as admitted by him, he had heard the names of Ajay Shahu, Pappu, injured-Satish and his brother Prakash for the first time on hat day. He did not make any note of this and he said that names of these persons were not given by him in his police statement as they were not asked.

7.2 It is also important to note that the Investigating Officer-P.I. N.R. Patel had reached the spot at 8.00 A.M. and still this witness did not inform N.R. Patel about having seen the incident or about the dying declaration. It is, therefore, clear that this witness improves and adds in his deposition his version about he having seen the assailants running away. Not only this, but it is also important to note that no test

identification parade was conducted by the Investigating Agency, though this witness did not know the assailants prior to the incident and though he had seen the assailants running away without identifying them. He, however, identifies the assailants in the court and, therefore, the improvement made in his deposition is only with a view to establish the identity of the appellants in the Court.

7.3 The conduct of this witness assumes greater importance since he is a police personnel and, therefore, it will have to be examined whether his conduct gives what is naturally expected of a police personnel. Here is a witness, who claims to have seen the assailants running away and claims that declaration was made by the deceased before him, takes no action to help the investigation. Although Police Inspector-Makwana and Police Inspector-Patel both met him within minutes of the incident, he discloses nothing about these aspects and quietly goes home. He comes after eight hours to resume his duty and, at that time, when his statement is recorded, he gives the version. Again, there are improvements in his version while he deposes before the Court.

7.4 All these factors render the deposition unworthy of credence.

8. The third material evidence is that of Manubhai Chotalal Bhatt (Ex.23). He was the Head Constable posted at L.G. Hospital, who sent telephone Wardhi. That Wardhi is at Ex.24. which indicates that a patient named Satishchandra Harivansh Dhobi, aged 17 of Maninagar Railway Colony was brought to L.G. Hospital at about 7.00 A.M. in the morning. While he was going to Dhruv High School on his bicycle, was assaulted upon with sharp instrument by Ajay Shahu and Pappu, who came on scooter No.GJ-I-C-8885, when he was passing by D-34 Dispensary. That the assailants have run away abandoning the scooter and that he has been brought to the hospital by his brother-Prakash. The witness in his deposition reiterates the contents of the Yadi. He states that ordinarily, the name of the person who gives the information is indicated in the Yadi. In the Yadi (Ex.24), name of the informant is not recorded. It emerges from his deposition that he had sent the Wardhi/Yadi (Ex.24) on receiving information from injured Satishchandra and, therefore, it can be considered as an oral dying declaration before this witness. This oral dying declaration will have to be considered in light of the other material in the form of deposition of Dr.

Patil to the effect that the injured would have become unconscious within seconds/minutes of receiving the injuries, admission of complainant Prakash that his brother became unconscious after giving oral dying declaration before him in the auto-rickshaw and the Admission Note (Ex.29) which indicates that though the patient was conscious, he was under shock and was not responding. Deposition of Dr. Premal Desai (Ex.28) would also assume importance for considering the case of this witness Manubhai. The doctor says that when the patient was brought, he was under shock and he was accompanied by his relatives. He, therefore, inquired of them and the relatives informed the doctor that somebody had caused the injuries. The doctor does not remember whether the relatives had given name of the assailants. The fact, however, remains that when Dr. Premal Desai inquired about the incident, the reply did not come from the victim, but the information was given by the relatives. Dr. Desai does not even say that Manubhai came and inquired about the incident from the victim in his presence. Manubhai himself admits that he had not inquired from the doctor about the condition of the victim and his capacity of giving a statement.

8.1 Cross-examination of witness-Manubhai indicates that the entry was completed in two spells. The number of the scooter was subsequently added. It is also an admitted position that there is overwriting in the entry.

9.2 The cumulative effect would be that the version of Manubhai Chotalal Bhatt (Ex.23) raises a number of questions rendering the deposition doubtful. Why name of the informer is not disclosed in the Wardhi (Ex.24) is a question which remains unanswered. Why doctor was not consulted before approaching the victim is also unanswered and it is a matter of doubt whether the victim was conscious and, if conscious, whether he was in a position to give information about the assailants as stated by this witness.

10. Other factors that weaken the prosecution case are the evidence of Dr. Patil, who in examination-in-chief states that muddamal knife could not have caused the injuries found on person of the deceased.
10.1 The complainant's case that while carrying the deceased to the hospital, his own trousers were blood stained and he went to the police wearing the blood stained clothes. Despite this, his trousers are not seized by police nor are they sent for chemical examination to the F.S.L. This factor assumes importance in light of the fact that, according to Ansuyaben,

Prakash arrived for the first time at the hospital. This would affect the case of complainant-Prakash that dying declaration was given by the deceased while he was taking him in the auto-rickshaw to the hospital.

10.2 The owner of the scooter is not examined as a witness. There is no evidence with regard to the ownership of the scooter or to indicate that the appellant was in possession of the scooter at the relevant time since the prosecution case is that the appellant in company of Pappu went on the scooter to the place and committed the crime. This aspect is also not proved.

11. The prosecution case, therefore, if viewed as a whole, suffers from a large number of defects. Eyewitness-Avtarsinh and Ansuyaben have not supported the prosecution case. The dying declarations made before Prakash, Dipuji and Manubhai suffer from the defects discussed hereinabove and the investigation also suffers from several weaknesses and leave certain question uninvestigated and unanswered. It is true that the witnesses-Dipuji and Manubhai are police personnel and it is nobody's case that they have any enmity against the appellant and, ordinarily, they will have no reason to falsely implicate the appellant, but the prosecution case depends only on the oral dying declarations claimed to have been made before these witnesses and, as discussed above, it becomes a matter of doubt as to whether these dying declarations could have been made before these witnesses; whether the victim was conscious; if conscious, whether he was in a position to speak and give the declaration; and how far these factors become relevant and the evidence in this regard is doubtful. In our opinion, the doubts created in the prosecution case would make the prosecution case unacceptable and the benefit must go to the accused-appellant. We are, therefore, inclined to accept the appeal. It is not possible to uphold the conviction which is challenged in this appeal.

12. We, therefore, allow this appeal and set aside the judgment and order rendered by the learned Additional Sessions Judge, Court No.XI, City Civil and Sessions Court, Ahmedabad in Sessions Case No.40 of 1993 on September 21, 1993. The appellant-Ajaykumar Nathuram Shahu be set at liberty forthwith if not required in any other case. Fine, if paid, will be refunded to the appellant. Appropriate order may be passed by the Metropolitan Magistrate after following the procedure of inquiry in respect of muddamal-scooter.

13. Direct service of the operative order is permitted.

[M.C. PATEL, J.]

[A. L. DAVE, J.]

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